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No. 10-871

In the
Supreme Court of the United States

GENERAL ELECTRIC CO.,

PETITIONER,

v.

LISA PEREZ JACKSON, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

PAUL D. CLEMENT
Counsel of Record
DARYL L. JOSEFFER
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500
PClement@kslaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States

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INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. At least 98% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber participated as an *amicus* in this case before both the court of appeals and the district court.

This case is especially important to the Chamber because of the Environmental Protection Agency's ("EPA's") longstanding pattern and practice of issuing Unilateral Administrative Orders ("UAOs") as a matter of course, in non-emergency situations,

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[1] Pursuant to Sup. Ct R. 37 2(a), *amicus curiae* notified the parties of its intent to file this brief 10 days prior to the date of filing. The parties have consented to the filing of this brief in letters submitted herewith or on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

without providing any pre-deprivation process before a neutral decisionmaker.

Administrative law is full of flexible procedures that constitutionally balance the government's need for flexibility with private citizens' right to due process, including the right to a hearing before a neutral decisionmaker before (or, in an emergency, promptly after) any deprivation occurs. Nonetheless, the D.C. Circuit blessed the Environmental Protection Agency's ("EPA's") aberrational practice of routinely issuing in non-emergency situations aptly named Unilateral Administrative Orders, without pre-issuance process before a neutral decisionmaker, to any company it deems potentially responsible for a violation of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq* The D.C. Circuit's decision encourages EPA's unbridled use of the coercive tool of UAOs to compel companies to undertake costly site clean-ups, irrespective of their liability for the underlying environmental damage. That practice exposes Chamber members to billions of dollars in costs, damages, and devastating market impacts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is essentially whether due process jurisprudence should account for the enormous consequences EPA imposes when it routinely employs a drastic administrative weapon Congress designed only for emergencies. The court of appeals acknowledged that the "consequences of UAOs can be substantial." Pet. App. 32a. Indeed, as

the district court found, UAOs can drive companies out of business.

Companies have devoted billions of dollars to complying with UAOs. But the consequences of non-compliance, which are at issue here, are even greater. A UAO immediately adjudicates the company legally culpable and recalcitrant if it opts not to comply. A UAO reduces the company's stock value and credit rating, which increases the company's cost of capital. A UAO impairs the company's right to dispose of the relevant real property. And companies have no realistic way to challenge UAOs because there is no right to timely judicial review (whether they comply or not).

Nonetheless, the D.C. Circuit held that those substantial consequences trigger *no* due process scrutiny because they do not amount to a deprivation of property. If that were correct, the Due Process Clause would provide far more protection for the repossession of a toaster than for the destruction of millions of dollars in market value, and the attendant limitations on the alienability of the affected real property.

But the court of appeals' extreme position — that "consequential" injuries categorically do not so much as trigger due process concerns, in any circumstances and no matter how grave the injury — is incorrect. Indeed, it is contrary to this Court's 20-year-old decision in *Connecticut v. Doehr*, 501 U.S. 1 (1991), which recognizes that liens and similar attachments may trigger due process protections. The court of appeals' strained interpretation, moreover, would have dramatic consequences if left

uncorrected. A company's impaired capacity to enter into the financial markets and to secure equity and debt financing critically undermines its ability to provide services, make products, hire and retain employees, pursue business opportunities and upgrades, and make vital investments in research and development in today's economy. In dismissing such harms to businesses' fundamental property rights as being constitutionally inconsequential, the decision below sets a dangerous precedent by which the executive and legislative branches can adjudicate industry liability and coerce industry compliance without the checks and balances of independent judicial review afforded by the Due Process Clause.

The court of appeals further erred when it concluded that the UAO scheme is insufficiently coercive to violate the Due Process Clause under *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny. The D.C. Circuit invoked the illusory specter that UAO recipients may challenge them in court by opting not to comply and awaiting an enforcement action — even though enormous daily penalties could continue to accrue while EPA took full advantage of a lengthy statute of limitations to let the potential penalties become unbearable before the agency would so much as file an enforcement action. The extensive record in this case proves that the penalties for noncompliance are so coercive that nearly all UAO recipients have capitulated and paid billions of dollars in clean-up costs rather than invoke their right to judicial review. UAO recipients simply cannot risk the consequences of noncompliance. Those very real burdens cannot be

discounted, and they give rise to a violation of the Due Process Clause under *Ex Parte Young*.

Precisely because EPA's unilateral orders violate the most basic due process rights, they are an outlier in administrative law. Numerous administrative law schemes provide pre-deprivation process, or at least prompt post-deprivation process, in situations involving genuine emergencies. But EPA admits that it does not use UAOs in emergencies; instead, it uses them as a matter of course in routine CERCLA matters — and has therefore issued more than 1,700 UAOs to more than 5,400 companies. Requiring EPA to provide basic due process protections would merely bring its UAO scheme into line with other regulatory schemes. In contrast, sanctioning this UAO regime would give other agencies every incentive to mimic it, further underscoring the importance of the issue.

ARGUMENT

I. THE DECISION BELOW UNDULY LIMITS CONSTITUTIONALLY COGNIZABLE DEPRIVATIONS OF "PROPERTY."

A. The Decision Below Creates Confusion Over Whether Consequential Injuries Trigger Due Process Protections.

Questions of procedural due process entail a familiar two-step inquiry: first, whether the challenged deprivation was a denial of "property" or "liberty" within the meaning of the due process clause; and second, whether the procedures attendant to any deprivation are constitutionally sufficient. *See Ky. Dep't of Corr. v. Thompson*, 490

U.S. 454, 460 (1989). The decision below strained to dismiss the significant harms that UAOs effect on recipient companies at the first, threshold step — holding categorically that "consequential injuries," no matter how severe, do not implicate due process at all. Pet. App. 13a-23a.

While not every injury amounts to a cognizable denial of "property," *see Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court has continually made clear that whether a challenged deprivation triggers due process protections depends very much on its consequences. In *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988), for example, this Court held that "state procedures for creating and enforcing ... liens are subject to the strictures of due process" where the lien's very issuance triggers "serious consequences." *Id.* at 85; *see also id.* at 86 (emphasizing "substantial adverse consequences"). The Court explained that even when no execution sale of the property has yet occurred, the very filing of the lien creates "a cloud on appellant's title," "encumber[s] the property and impair[s] appellant's ability to mortgage or alienate it." *Id.* at 82, 85. That the "judgment against [a party] *and the ensuing consequences* occurred without notice ... and ... an opportunity to be heard" amounted to a due process violation. *Id.* at 86 (emphasis added); *see also Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604 (1974); *Hodge v. Muscatine County*, 196 U.S. 276, 281 (1905).

In *Connecticut v. Doehr*, 501 U.S. 1 (1991), this Court directly imported that holding about liens into the context of attachments and similar encumbrances on property. "*Without doubt*," the

Court declared, "state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'" 501 U.S. at 12 (quoting *Peralta*, 485 U.S. at 85) (emphasis added). Acknowledging that pre-judgment attachment did "not amount to a complete, physical, or permanent deprivation of real property" and had an impact "less than the perhaps temporary total deprivation of household goods or wages," the Court nonetheless cautioned that due process protections are not confined to such "extreme" deprivations. *Id.* at 12. Again, the Court underscored the significant "consequences" of the challenged act: "attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Id.* at 11-12; *see also id.* at 27-28 (Rehnquist, J., concurring in part and concurring in the judgment) (quoting same language in agreeing that due process protections were triggered despite owner's "undisturbed possession" of property).

Thus, this Court and the courts of appeals have long understood that, where the consequences are sufficiently grave, "even the temporary or partial impairments to property rights that attachments, liens, *and similar encumbrances* entail are sufficient to merit due process protection." *Id.* at 12 (emphasis added); *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 298-300 (1981) (immediate cessation order halting surface mining operations was cognizable deprivation of property);

Burns v. Pa. Dep't of Corr., 544 F.3d 279, 281, 288-91 (3d Cir. 2008) (assessment of inmate account for medical expenses, even absent deduction of funds, was cognizable deprivation of property); *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1258-59 (11th Cir. 2003) (administrative compliance order was more than "merely a complaint-like instrument with no legal significance" and violated due process); *United States v. 408 Peyton Road SW*, 162 F.3d 644, 650-51 (11th Cir. 1998) (en banc) (arrest and seizure warrants for property, even absent physical seizure, were cognizable deprivations of property); *Reardon v. United States*, 947 F.2d 1509, 1523 (1st Cir. 1991) (en banc) (CERCLA lien, even absent a final liability determination, was cognizable due process deprivation).

The D.C. Circuit, however, adopted the extreme position that "nothing" even "implies" that consequential injuries can merit due process protection. Pet. App. 16a. The D.C. Circuit read *Doehr* only for the narrow and limited proposition that consequential injuries may impact how much process is due, but not the antecedent issue "*whether* attachment requires due process protection." Pet. App. 15a-17a (emphasis in original). That strained parsing cannot be squared with this Court's opinion, which explicitly described the aforementioned "consequences" on title, alienability, and financing as "*property interests* that attachment affects" and that "trigger due process concern." 501 U.S. at 11-12 (emphasis added).

Nor can that narrow view of the relevance of consequential injuries be squared with decisions of the First, Second, and Third Circuits and numerous

state supreme courts, as described in the Petition. *See* Pet. 15-19. For example, the First Circuit's opinion in *Reardon* quoted *Doehr*'s "consequences" language in a subsection entitled "The Deprivation," before moving on to a subsection entitled "What Process Is Due" — thus considering consequential injuries at the *first* step of the due process inquiry. *See* 947 F.2d at 1518.

By relegating the relevance of consequential injuries to the *second* step alone, the D.C. Circuit treated severe consequential injuries as being irrelevant to whether any due process protection applies at all. The court thereby departed from precedents of this Court and the courts of appeals, furthering the lower courts' uncertainty about the basic contours of due process protection.

B. The Decision Below Erroneously Held That UAOs Do Not Trigger Due Process Protections.

The court of appeals' error was outcome-determinative because UAOs have substantially the same effects as liens and other direct encumbrances on property rights that this Court has long recognized as meriting due process protection.

Doehr's critical holding — that "temporary or partial impairments to property rights that attachments, liens, *and similar encumbrances* entail are sufficient to merit due process protection," 501 U.S. at 12 (emphasis added) — requires courts to assess whether a challenged action has impacts sufficiently "similar" to those of liens or attachments. *See Reardon*, 947 F.2d at 1518 (CERCLA lien "amounts to deprivation of a 'significant property

interest'" because it "has *substantially the same effect ... as the attachment* had on the plaintiff in *Doehr* — clouding title, limiting alienability, affecting current and potential mortgages.") (emphasis added).

The D.C. Circuit, however, emphasized that UAOs are not attachments, and left its reasoning at that. *See* Pet. App. 16a. The D.C. Circuit thus wholly bypassed the requisite assessment of whether UAOs' effects on title, alienability, or financing are sufficiently analogous to those of liens or attachments.

They are. Like a lien, a UAO does not deprive the recipient of the physical use or possession of its property, but a UAO's impact on the affected property is nonetheless immediate and palpable: The UAO impairs the company's right to dispose of the property by limiting alienability. It deters potential buyers and mortgage lenders by leaving them uncertain as to the extent of the ultimate liability. Even beyond the specific property or operation implicated, the UAO reduces the company's stock value and credit rating. *See* Pet. App. 60a, 71a. Moreover, the imposition "may be in place for a considerable time without an opportunity for a hearing," since CERCLA's statute of limitations throws the judicial determination "so far into the future as to render it inadequate." *Reardon*, 947 F.2d at 1519-20.

As the petition explains, therefore, the concrete consequences of EPA's routine issuance of thousands of UAOs in non-emergency situations cannot be overstated. *See* Pet. 26-27. A UAO's extraordinary

consequences can literally put smaller businesses out of business, as the district court recognized. Pet. App. 77a. And while a company may or may not be greater than the sum of its parts, its very existence is surely a weightier due process interest than the toaster in its lunch room, which cannot be reclaimed without due process protections. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 89-90 (1972).

It is also completely unnecessary for EPA to impose those burdens unilaterally, without process before a neutral decisionmaker. EPA has alternatives for forcing a party to clean up a site in a non-emergency situation that comply with due process. For example, Congress authorized EPA to seek an order from a federal district court compelling a company to perform a clean-up. 42 U.S.C. § 9606(a). But few seek judicial approval for that which they can compel unilaterally, and thus EPA has preferred UAOs to the rigors of providing notice and an opportunity to be heard. As a result, EPA no longer goes to court to seek a clean-up order. Instead, it relies upon the expedience of UAOs and has issued over 1,700 of them to more than 5,400 companies — which averages "approximately six UAOs to nineteen [companies] every *month*." Pet. App. 82a. It is certainly understandable that EPA would choose to issue unilateral orders rather than prove its case before a neutral decisionmaker. But the Due Process Clause does not leave that choice with the agency. *See Fuentes*, 407 U.S. at 90 & n.22.

Nevertheless, the decision below treats the severe burdens that UAOs pose on their recipients as legally irrelevant. It ignores how, in the modern economy, impairing businesses' capacity to enter into

the financial markets and to secure equity and debt financing dramatically undercuts their provision of good and services, hiring, and critical investments in business upgrades and research and development. *See* Pet. 27-28. By giving EPA a blank check to impose such devastating burdens on the property rights of businesses through routine adjudicatory acts, the decision below sets a troubling precedent, encouraging other agencies to adopt similar schemes insulated from the checks and balances of independent judicial review. The D.C. Circuit's opinion, if left unreviewed, invites regulatory overreach with rippling effects well beyond the CERCLA context. CERCLA alone has generated well over $5 billion in response costs by complying recipients. If the executive and legislative branches use unilateral orders to adjudicate industry liability other contexts without heed to economic realities or due process restrictions, businesses will no doubt be saddled with billions more in coerced compliance costs and exponentially greater harms.

II. THE UAO REGIME IS EXTRAORDINARILY COERCIVE.

The UAO scheme violates due process for the additional reason that CERCLA's penalties are "so enormous ... as to intimidate" UAO recipients from "resorting to the courts to test [an order's] validity" before complying with it. *Ex Parte Young*, 209 U.S. 123, 147 (1908). The D.C. Circuit based its contrary holding on the assumption that recipients can readily obtain pre-deprivation judicial review of a UAO by refusing to comply and forcing EPA to sue them in court. That assumption blinks reality.

It ignores *statistical* realities, as borne out by the uniquely developed record in this case. Experience amassed over the last three decades has shown that of the more than 5,400 recipients of UAOs, "very few ... have ever dared defy a UAO in order to challenge its validity through independent judicial review." Pet. 25; *see also* Pet. 20-21. Only a bare handful of UAO recipients have ever sought or obtained independent judicial review of an order. *See* Pet. 8, 21.

It also blinks *economic* realities. The costs of compliance are significant; UAO recipients have spent over $5 billion in response costs at CERCLA sites over the past thirty years. *See* Pet. 3. But the costs of non-compliance are undeniably greater. A party that does not greet a UAO with immediate compliance faces penalties of up to $37,500 *per day*. *See id.*; *see also* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 40 C.F.R. § 19.4. These severe penalties accrue until EPA, in its sole discretion, decides to bring suit after the agency has funded a clean-up. Penalties can total $36 million when, as in the average case, the clean-up takes three years. Penalties can top $130 million when EPA waits the full six years to bring suit against the UAO recipient, as is its statutory right. *See* 42 U.S.C. § 9613(g)(2). EPA, moreover, may seek punitive damages of up to three times the clean-up costs. *See* 42 U.S.C. § 9607(c)(3). This is, quite simply, regulation-by-sledgehammer.

At the same time, a non-complying UAO suffers market impacts on its stock price, brand value, and cost of financing that dwarf these severe fines and penalties. Those market impacts have immediate real-world impact on a company's ability to hire and

its relationships with stakeholders. Worse, those impacts can plague a company for years as the government "'take[s] its own sweet time before suing,'" Pet. 21 (citation omitted) — leaving the company with no hearing before a neutral decisionmaker until EPA brings suit many years later. *See* 28 U.S.C. § 2462.

At bottom, UAOs are so highly coercive that the recipient has no real choice but to comply. Although the D.C. Circuit inexplicably deemed the non-compliance rate "sufficiently numerous" to foreclose any suggestion that UAO recipients are coerced into compliance, *id.*, that completely misses the mark. By any measure, very few UAO recipients have ever opted not to comply with a UAO in order to challenge it in court.

Given the substantial costs of compliance, the real question is why any company would foot the bill before its day in court. The fact that all but a handful of the thousands of UAO recipients pay the substantial costs of compliance is irrefutable evidence that the coercion is real. The few companies that elected to seek judicial review are isolated exceptions that merely prove the rule — companies that either lacked the resources to comply with a UAO and were forced to take their chances, or perhaps miscalculated and served as a cautionary tale for industry peers. For all but the truly desperate or reckless, non-compliance is only an illusory option — available in theory, but not a meaningful path to judicial review in practice. The "result is the same as if the law in terms prohibited the [party] from seeking judicial [review]" at all. *Ex Parte Young*, 209 U.S. at 147.

Thus, despite the impositions of thousands of UAOs and billions of dollars in attendant liabilities over three decades, courts have played little role in overseeing UAOs. In effect, legal standards governing UAOs and EPA's issuance of them remain as non-existent as they were at the incipience of EPA's UAO practice.

The court of appeals erred by treating the theoretical availability of judicial review, instead of the proven reality of the situation, as dispositive. *Ex Parte Young* explicitly called for courts to look not to possibilities in the abstract, but to concrete "result[s]." *Id.* Yet the D.C. Circuit erroneously determined that UAO recipients face no dilemma only by discarding the "result[s]" of the last three decades. The D.C. Circuit stated that a non-complying company would not necessarily face the onerous fines and penalties associated with non-compliance, because a court must find that the UAO was proper and that the recipient "willfully" failed to comply "without sufficient cause," *see* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3), and retains the discretion to withhold fines and treble damages.

In actuality, the purported "safeguards" afford cold comfort to UAO recipients — which is why recipients overwhelmingly choose to incur the high costs of compliance. Pet. App. 11a. That companies could theoretically avoid a massive contingent liability if they had "sufficient cause" not to comply is of little moment where recipients are at a loss as to what defenses are "sufficient." *See Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 391 (8th Cir. 1987) (calling on EPA to develop guidance on the contours of "sufficient cause"); *cf. Reisman v. Caplin*,

375 U.S. 440, 446-50 (1964) (contemplating less vague "good faith" defense). Similarly, that courts theoretically "may" exercise judicial discretion over CERCLA penalties is of little significance where companies have little inkling as to whether or how a court would exercise that discretion in any given case. And the proof is in the proverbial pudding — the fact that virtually every UAO recipient chooses to incur high compliance costs instead of risk the consequences of non-compliance is all one needs to know about the unilateral orders' extremely coercive effect.

III. THE UAO SCHEME IS AN ABERRATION AMONG ADMINISTRATIVE LAW STATUTES.

The UAO scheme's deviation from fundamental due process principles is underscored by its deviation from other administrative law regimes. EPA's unilateral orders are so coercive, and their consequences so dire, that one would expect *heightened* procedures to apply to their issuance. Yet EPA routinely issues UAOs with significantly *less* process than other agencies use in circumstances implicating far less weighty private interests and far greater exigencies.

Other comparable regulatory schemes afford recipients of adjudicatory orders either a prior hearing before a neutral decisionmaker or a prompt opportunity for independent review after the order is issued. *See* Pet. 23 & n.11. CERCLA's UAO scheme does neither. Indeed, it not only fails to provide prompt pre-deprivation review, it expressly *precludes* such review by stripping federal courts of

jurisdiction to hear declaratory challenges. *See* 42 U.S.C. § 9613(h) (precluding federal court challenges to UAOs until orders are complied with or EPA brings suit). Holding EPA to bedrock constitutional requirements would hardly threaten the operation of the modern administrative state. To the contrary, it would bring the aberrational UAO scheme in line with the procedures already adhered to by other agencies.

1. Most administrative law statutes provide pre-deprivation process. That is so even when the private interests are less weighty and there is a more pronounced governmental urgency. The Consumer Product Safety Act, 15 U.S.C. §§ 2051-2089, for example, requires the Consumer Product Safety Commission ("CPSC") to file a district court action against an "imminently hazardous consumer product" and its manufacturer, distributor, or retailer, where the product presents an "imminent and unreasonable risk of death, serious illness, or severe personal injury." *Id.* § 2061(a). Notwithstanding the grave hazards posed by the product, Congress still requires the CPSC to bring an action in an Article III court before halting the manufacture or distribution of the product. *See id.* §§ 2061(a), (b).

In similar fashion, the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, requires the Secretary of Labor to petition a federal district court if it seeks to "restrain any conditions or practices in any place of employment." *Id.* § 662(a). Again, the statute requires such pre-deprivation judicial process even where the underlying violations can

reasonably be expected to "cause death or serious physical harm immediately." *Id.*

Likewise, the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692, requires the EPA Administrator to commence a civil action in federal district court in order to seize an "imminently hazardous chemical substance" or obtain relief against persons who manufacture, process, distribute, or use such substances. *See id.* § 2606.

In regulatory schemes that do not involve a pronounced interest in speed, as here, pre-deprivation process is even more common. For instance, under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, the Federal Trade Commission may bring suit in federal district court to seek an injunction where a person "is violating, or is about to violate, any provision of law enforced by the [Commission]" and an injunction "would be in the interest of the public." *Id.* § 53(b).

2. In *true* emergencies readily distinguishable from the circumstances in which EPA employs UAOs, administrative law statutes typically provide, at a minimum, for prompt post-deprivation process. The Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.*, authorizes the Secretary of Energy to issue orders to "prohibit the dissemination" of sensitive information related to nuclear weapons and atomic energy, in light of the critical governmental interests in secrecy concerning nuclear weapons and energy and the prevention of nuclear proliferation. *Id.* § 2168(a)(2). The Secretary may issue such orders where "dissemination of such information could reasonably be expected to have a significant adverse effect on

the health and safety of the public or the common defense and security by significantly increasing the likelihood of (A) illegal production of nuclear weapons, or (B) theft, diversion, or sabotage of nuclear materials, equipment, or facilities." *Id.* But anyone affected by such an order may seek immediate judicial review. *See id.* § 2168(d) (citing 5 U.S.C. § 552(a)(4)(B)). Even in this near-doomsday scenario, the statutory regime provides for immediate post-deprivation review.

Similarly, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, compensates for the lack of a *pre*-deprivation remedy by providing prompt *post*-deprivation process. *Id.* § 78y(a). The Act authorizes the Securities and Exchange Commission ("SEC") to summarily take action to restore order to financial markets and ensure proper settlement of transactions in emergencies — namely, "major market disturbance[s]" such as "sudden and excessive fluctuations of securities prices generally" or major disruption to "the functioning of securities markets." *Id.* §§ 78*l*(k)(2), (7)(A). Even in these emergency situations, however, the Act provides for expeditious post-deprivation review in a United States Court of Appeals. *Id.* § 78y(a).

The Commodity Futures Trading Commission Act, 7 U.S.C. §§ 1 *et seq.*, likewise allows unilateral action in emergencies but permits post-deprivation judicial review. The Act authorizes the Commodity Futures Trading Commission ("CFTC") "to direct" certain parties to set "temporary emergency margin levels on any futures contract" when the Commission "has reason to believe that an emergency exists." *Id.* § 12a(9). But it also permits an affected party to

seek review immediately before a United States Court of Appeals. *Id.*

Meanwhile, the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, allows the EPA Administrator to issue "emergency orders" where "necessary to protect public health or welfare or the environment" without filing a civil action in federal court, as it would in an ordinary abatement action. *Id.* § 7603. But even these emergency orders can remain in effect for "not more than 60 days," unless the EPA Administrator brings an action in federal court to seek an extension. *Id.*

3. Another category of administrative law statutes provides dual tracks for emergency and non-emergency situations. Those statutes reflect Congress's understanding that the degree of due process protection is appropriately tethered to the degree of underlying exigency.

Under the Federal Aviation Act, 49 U.S.C. §§ 40101 *et seq.*, the Administrator of the Federal Aviation Administration may suspend or revoke an operating license for purposes of safety or otherwise to protect the public interest. *Id.* § 44709(b). Notice and "an opportunity to answer" are mandated, "[e]xcept in an emergency." *Id.* § 44709(c). In an emergency, the Administrator's order becomes effective immediately, *id.* § 44709(e)(2), but the affected party may immediately submit a petition for review by the National Transportation Safety Board ("NTSB"), *id.* § 44709(e)(3). The NTSB must review and decide the petition no more than *five days* after it is filed. *Id.*

The Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, employs a similar dual scheme. In non-emergency situations, the Secretary of the Interior, who has authority to investigate violations, must "issue a notice to the permittee" and "provid[e] opportunity for public hearing." *Id.* § 1271(a)(3). By contrast, in emergency situations involving "imminent danger to the health or safety of the public" or "imminent environmental harm," the Secretary has authority to issue a cessation order without providing pre-deprivation process. *Id.* § 1271(a)(2). The adversely affected party, however, may immediately seek relief from the order, and the Secretary must respond to the request within five days. *Id.* § 1275(c). If unsuccessful, the affected party may then seek an adjudicatory hearing followed by judicial review. *Id.* § 1276. Because the "mine operators are afforded prompt and adequate post-deprivation administrative hearings and an opportunity for judicial review," these emergency cessation orders provide adequate due process. *Hodel*, 452 U.S. at 303.

Likewise, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y, distinguishes between "imminent hazard" situations and "emergency" situations. *See id.* § 136d(c). If the EPA Administrator determines that suspension of a pesticide registration is necessary to prevent an "imminent hazard," he or she must notify the registrant prior to any suspension so the registrant has an opportunity to seek an administrative hearing as to whether an "imminent hazard" in fact exists. *Id.* § 136d(c)(1). Any hearing, moreover, must take place within five days of the request for

that hearing. *Id.* § 136d(c)(2). Any final order following an expedited hearing is then subject to immediate judicial review in district court. *Id.* § 136d(c)(4). If, on the other hand, the EPA Administrator determines that an "emergency" prevents a pre-suspension administrative hearing, the suspension is immediately reviewable by a district court. *Id.* § 136d(c)(3)-(4).

4. Against that broader background of administrative practice, EPA's UAO scheme represents an extreme outlier. To be sure, as the D.C. Circuit noted, EPA issues similar orders under other environmental statutes and requires recipients to comply without affording prior trial-type hearings. *See* Pet. App. 33a (citing C.A. Amicus Br. of Nat. Res. Def. Council, et al. 30-33, which cited provisions of the Clean Air Act, 42 U.S.C. § 7413, Clean Water Act, 33 U.S.C. § 1319, and Resource Conservation and Recovery Act, 42 U.S.C. §§ 6934, 6973). But the EPA's broader pattern and practice of issuing onerous unilateral administrative orders only underscores the practical importance of the issue.

Tellingly, a number of lower courts have expressed skepticism of the constitutionality of the orders EPA issues under other environmental statutes. In the most striking example, the Eleventh Circuit held unconstitutional the Clean Air Act's scheme for issuing "administrative compliance orders." *Tenn. Valley Auth.*, 336 F.3d at 1258-59; 42 U.S.C. § 7413. The Eleventh Circuit reasoned that, to the extent that noncompliance with the orders triggered severe civil and criminal penalties without a "full and fair hearing before an impartial tribunal," the statute violated fundamental principles of due

process. *Tenn. Valley Auth.*, 336 F.3d at 1258-60; *see also Sackett v. EPA*, 622 F.3d 1139, 1145 (9th Cir. 2010) (adopting narrowing construction of Clean Water Act compliance orders provision but noting that "literal" reading of CWA ... could indeed create a due process problem"); *Armco, Inc. v. EPA*, 124 F. Supp. 2d 474, 477-78 (N.D. Ohio 1999) (concluding that a Resource Conservation and Recovery Act order comported with due process, but warning EPA that "the Court can conceive of some pre-enforcement orders where due process concerns would be implicated").

That makes this Court's review of the UAO scheme all the more critical. There is nothing unique about EPA, CERCLA, or any other environmental statute that would warrant an exception to the fundamental principles of due process that are widely applied by other agencies. To the contrary, as noted above, some other environmental statutes require EPA to follow traditional due process principles, and there is no indication that those statutes have proven to be unworkable. In addition, EPA's capacity under CERCLA to seek an abatement order in court or to undertake clean-ups directly shows that there is no need for EPA to issue UAOs *even in true emergencies*. Pet. App. 182a. In fact, EPA has admitted that it does not issue UAOs in true emergencies. That makes it absurd for EPA to issue UAOs without traditional due process protections in routine, non-emergency situations, especially considering the severe and immediate consequences for UAO recipients.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Paul D. Clement
Counsel of Record
Daryl L. Joseffer
Candice Chiu
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006

Robin S. Conrad
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

Counsel for Amicus Curiae the Chamber of Commerce of the United States

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